

NOTICE
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2013 IL App (4th) 130296-U

NO. 4-13-0296

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 20, 2013

Carla Bender

4th District Appellate
Court, IL

TERRY YOUNG,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Champaign County
ELLEN N. SCHWEITZER,)	No. 11L231
Defendant-Appellee.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff failed to establish the trial court abused its discretion in granting defendant's motion to dismiss his complaint pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) or in ruling on that motion without first conducting an evidentiary hearing.

¶ 2 Plaintiff, Terry Young, appeals the trial court's dismissal of his negligence complaint against defendant, Ellen N. Schweitzer, pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) for failing to exercise reasonable diligence in obtaining service upon defendant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 5, 2011, plaintiff filed a negligence complaint against defendant, seeking to recover damages for injuries he allegedly sustained as the result of a December 4, 2009, motor vehicle accident involving the parties. (Although plaintiff's complaint was filed

more than two years after the parties' accident (see 735 ILCS 5/13-202 (West 2010), it was timely filed because the limitations period expired on a weekend and plaintiff filed his complaint the following Monday (see 5 ILCS 70/1.11 (West 2010)). On December 7, 2011, he filed an amended complaint raising the same claim.

¶ 5 On August 20, 2012, an affidavit of service was filed, showing service of the complaint and a second alias summons on defendant on August 7, 2012. The record reflects the second alias summons had been issued by the circuit court clerk on July 31, 2012; the process server was Meador Investigations; and the location of service on defendant was "2120 Ivy Ct., Champaign, Illinois 61821." The record contains no other returns and, with respect to the issuance of any summons, shows only that plaintiff paid alias summons fees of \$5 on June 5, 2012, and July 31, 2012.

¶ 6 On September 10, 2012, defendant filed a motion to dismiss plaintiff's complaint pursuant to Rule 103(b) (eff. July 1, 2007), arguing plaintiff failed to exercise reasonable diligence in obtaining service upon her. Defendant asserted plaintiff failed to request that the circuit court clerk issue an initial summons when the case was filed in December 2011; the first alias summons was not issued until June 5, 2012; the court record failed to reflect any activity by plaintiff during the six-month period between the filing of her complaint and the issuing of the June 2012 alias summons; and she was ultimately not served until August 7, 2012, eight months and two days after the complaint was originally filed.

¶ 7 On January 17, 2013, plaintiff filed a response to defendant's motion to dismiss. He denied allegations that no initial summons was ever issued in the case or that he did nothing to obtain service on defendant in the six months after the case was filed. He attached a copy of a

summons to his response that was file-stamped with the date of December 21, 2011. The summons set forth defendant's name and address (2120 Ivy Court, Champaign, Illinois 61821), but was not signed or otherwise dated by the circuit court clerk.

¶ 8 On January 18, 2013, plaintiff filed a memorandum in support of his position. He asserted summons was first issued in the case on December 21, 2011, stating as follows:

"Counsel for the Plaintiff completed a form for Summons by hand, then had the same issued by the Circuit Clerk for Champaign County. Counsel had asked the clerk to not [*sic*] the issuance, and the clerk chose to do so by filing an uncompleted copy as 'Received December 21, 2011.' "

[C]ounsel for the Plaintiff deposited the first Summons issued in a drop box affixed to the wall in the Courthouse in a slot designated for Detect Systems, Inc. [(Detect Systems)], a business authorized to serve Summons on December 27, 2011."

Plaintiff further maintained, "in late January or early February 2012," his counsel prepared a second summons for issuance after no return of service was received following the initial summons. He alleged, on April 27, 2012, a third summons was issued and placed "in the drop-box at the Courthouse for the Champaign County Sheriff." Plaintiff attached a copy of a summons to his response that was signed by the circuit court clerk and dated April 27, 2012. That summons was directed to defendant at "2120 Ivy Ct., Champaign, IL 61821."

¶ 9 Plaintiff alleged a fourth summons was issued in the case on June 5, 2012, and

"placed in the drop-box" for Detect Systems. He attached a copy of a summons to his memorandum signed by the circuit court clerk and dated June 5, 2012, as well as a receipt that showed payment of \$5 for the issuance of an alias summons on that date. Again, the summons was directed to defendant at "2120 Ivy Ct., Champaign, IL 61821." After no response was received following the issuance of that summons and plaintiff's counsel was unable to successfully contact Detect Systems, a second alias summons was issued on July 21, 2012, and, ultimately, served upon defendant.

¶ 10 The affidavit of plaintiff's counsel, Michael McClellan, was attached to plaintiff's memorandum. McClellan asserted he prepared and reviewed the memorandum and all factual allegations made regarding his efforts to achieve service on defendant were true and correct to the best of his ability to recall.

¶ 11 The affidavit of Nicole Duge was also attached to plaintiff's memorandum. Duge asserted she began working for McClellan in mid-February 2012. She recalled preparing a summons in plaintiff's case that McClellan took to be issued. Duge recalled that, upon McClellan's return, "he indicated that he had placed the Summons in the drop-box for the Champaign County Sheriff for service." She further recalled preparing another summons, "which was issued on June 5, 2012," and that McClellan said had been dropped "off for Detect Systems *** at the Courthouse." Finally, Duge prepared a summons, "which was issued on July 31, 2012, and *** served by Meador Investigations, on August 8, 2012." (The record actually reflects service of the second alias summons was made on defendant on August 7, 2012).

¶ 12 Additionally, Duge asserted she made calls to Detect Systems and left messages, but no calls were returned. On January 15, 2013, McClellan sent a letter to Detect Systems and

was finally contacted by "Kris Douglas of Detect Systems" who reported that "material" Detect Systems mailed to McClellan was returned by the postal service because Douglas had used a previous and no longer valid address for plaintiff's counsel.

¶ 13 On January 24, 2013, plaintiff filed a motion for extension of time to seek leave to file an affidavit from Detect Systems. On February 1, 2013, plaintiff filed a motion for leave to file an affidavit *instantly*. He attached Douglas's affidavit to his motion. (Although it does not appear the trial court ruled on plaintiff's motion, the court references Douglas's affidavit in reaching its decision to grant defendant's motion to dismiss. We note the better practice would have been for the court to first rule on plaintiff's motion for leave to file Douglas's affidavit prior to deciding the motion to dismiss.) Douglas asserted she was a co-owner of Detect Systems and did "serve papers." She stated she attempted to serve "a series" of summonses on defendant on plaintiff's behalf and "made in the neighborhood of 20 attempts to serve [defendant] throughout 2012, up to July, 2012," at "2120 Ivy Court, in Champaign, Illinois," and all of her efforts were unsuccessful. Douglas further asserted she mailed her returns to plaintiff's counsel at 102 E. Main St., Suite 302, Urbana, Illinois, but each mailing was returned to her by the United States Postal Service.

¶ 14 On February 6, 2013, the trial court entered an order, granting defendant's motion to dismiss pursuant to Rule 103(b) (eff. July 1, 2007) with prejudice. Plaintiff filed a motion for reconsideration. On March 20, 2013, the court denied plaintiff's motion.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff argues the trial court abused its discretion in granting

defendant's motion to dismiss pursuant to Rule 103(b) (eff. July 1, 2007). He contends the court erred by dismissing his complaint solely on the documents filed relating to the motion to dismiss and failing to allow an evidentiary hearing. Plaintiff further contends the court's finding that he failed to exercise reasonable diligence in obtaining service on defendant was based on a misreading of the parties' filings and not otherwise supported by the record.

¶ 18 Initially, we address plaintiff's claim that the trial court erred in failing to conduct an evidentiary hearing. To support his position, plaintiff cites *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 24, 987 N.E.2d 818, wherein the Third District found the trial court erred in failing to allow the defendant to challenge the propriety of substitute service by publication. The court held that, because the defendant presented facts challenging the plaintiff's due inquiry efforts, a statutory prerequisite for service by publication, the trial court should have granted the defendant's request for an evidentiary hearing and required the plaintiff to establish due inquiry. *American*, 2013 IL App (3d) 120397, ¶ 24, 987 N.E.2d 818.

¶ 19 We find *American* factually distinguishable from the case at bar. Unlike *American*, this case involves a motion to dismiss pursuant to Rule 103(b) (eff. July 1, 2007) rather than a challenge to the propriety of substitute service by publication. Our research reveals no authority that requires a hearing on a Rule 103(b) motion to dismiss nor does plaintiff cite any authority other than *American* to support his position on appeal.

¶ 20 The local circuit court rules for Champaign County provide that "[t]he allowance of oral arguments upon motions [is] discretionary with the court" and the court "may *** decide a motion without hearing oral arguments." 6th Judicial Cir. Ct. R. 2.1(c) (Nov. 1, 1992). Citing this precise rule, the supreme court has recognized that the trial court has discretion to rule on a

motion without conducting a hearing. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 344, 775 N.E.2d 987, 999 (2002) ("According to [circuit court rule 2.1(c)], it was within the court's discretion to grant the motion to strike the affidavit and the motion for summary judgment without conducting a hearing."). "A decision within the trial court's discretion will not be disturbed on appeal unless there has been an abuse of discretion." *People v. Pierce*, 56 Ill. 2d 361, 364, 308 N.E.2d 577, 578 (1974).

¶ 21 Here, we find the trial court had discretion to grant defendant's motion to dismiss pursuant to Rule 103(b) without conducting a hearing. The court chose to base its ruling on the parties' written submissions without an evidentiary hearing and its decision to do so was not an abuse of discretion. Plaintiff's contentions that at a hearing he "may have been able to further enlighten the Court regarding certain aspects of [his] position" or that he "could have reiterated his efforts to contact the private server" fail to establish any abuse of discretion by the court. On appeal, plaintiff has failed to allege what *specific* evidence or argument he would have presented during a hearing that he did not present, or was otherwise unable to present, to the court through his written filings.

¶ 22 Moreover, under the circumstances presented, the record and the parties' written filings were more than sufficient to support the trial court's dismissal of plaintiff's action. Rule 103(b) (eff. July 1, 2007) provides for the dismissal of a complaint where the plaintiff fails to exercise reasonable diligence in obtaining service on the defendant. "If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice ***." Ill. S. Ct. R. 103(b) (eff. July 1, 2007). "Under Rule 103(b), the plaintiff has the burden of showing reasonable diligence in

service of process." *Smith v. Menold Construction, Inc.*, 348 Ill. App. 3d 1051, 1055, 811 N.E.2d 357, 361 (2004) (citing *Segal v. Sacco*, 136 Ill. 2d 282, 286, 555 N.E.2d 719, 720 (1990)).

¶ 23 "In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances." Ill. S. Ct. R. 103(b) (eff. July 1, 2007). It may consider several different factors, including "(1) the length of time used to obtain service of process; (2) the activities of plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service on defendant." *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 212-13, 880 N.E.2d 171, 175 (2007).

¶ 24 On review, the trial court's decision to grant or deny a Rule 103(b) motion to dismiss "will not be disturbed absent an abuse of discretion." *Case*, 227 Ill. 2d at 213, 880 N.E.2d at 175. "A court abuses its discretion only if its decision was 'clearly against logic.'" *Smith*, 348 Ill. App. 3d at 1055, 811 N.E.2d at 361 (quoting *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083, 732 N.E.2d 1094, 1096 (2000)).

¶ 25 Here, the trial court found plaintiff failed to exercise reasonable diligence in obtaining service on defendant. The court's five-page order sets forth the appropriate legal standards and reflects the court considered the relevant factors. The record supports the court's ultimate determination and plaintiff has failed to establish that the court abused its discretion.

¶ 26 The Code of Civil Procedure (Code) provides "[e]very action *** shall be commenced by the filing of a complaint" and "[t]he clerk shall issue summons upon request of the plaintiff." 735 ILCS 5/2-201(a) (West 2010). "The form and substance of the summons, and

of all other process, and the issuance of alias process, and the service of copies of pleadings shall be according to rules." 735 ILCS 5/2-201(a) (West 2010). A summons must "be issued under the seal of the court, tested in the name of the clerk, and signed with his name." Ill. S. Ct. R. 101(a) (eff. May 30, 2008). "A summons not signed by the clerk of the court which issued it is no summons [citation] and a summons issued not under the seal of the court is without validity, and, thus, the service of the same is without effect." *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 1001, 527 N.E.2d 693, 699 (1988).

¶ 27 "Promptly upon issuance, summons *** shall be placed for service with the sheriff or other officer or person authorized to serve process." Ill. S. Ct. R. 102(a) (eff. Jan. 1, 1967). "The officer or person making service shall make a return by filing proof of service immediately after service on all defendants has been had, and, in any event, shall make a return: (1) in the case of a summons bearing a specific return day or day for appearance, not less than 3 days before that day; (2) in other cases, immediately after the last day fixed for service." Ill. S. Ct. R. 102(d) (eff. Jan. 1, 1967). "[A] plaintiff has a nondelegable duty to (1) assure the clerk issued the summons, (2) deliver the summons to the process server for service, and (3) see the process server made a prompt and proper return." *Smith*, 348 Ill. App. 3d at 1056, 811 N.E.2d at 362 (citing *Penrod v. Sears, Roebuck & Co.*, 150 Ill. App. 3d 125, 129, 501 N.E.2d 367, 369 (1986)).

¶ 28 In this case, plaintiff alleged an initial summons was issued by the circuit court clerk at his request on December 21, 2011. Although he attached a copy of a summons bearing a file-stamp of that date to his memorandum, the summons was not signed and dated by the clerk. Thus, the record fails to reflect a valid summons was issued by the clerk in December 2011.

Additionally, aside from the bare assertion in plaintiff's written filings in response to the motion to dismiss, the record contains absolutely no support for his contention that a second summons was issued "in late January or early February 2012." The record does not show a return of service was filed with the trial court in connection with either of those alleged summonses. Plaintiff next argues summons was issued on April 27, 2012, and June 5, 2012. While he attached copies of summonses bearing those dates to his filings and the record confirms that he paid an alias summons fee on June 5, 2012, again, no return was filed in connection with either summons.

¶ 29 As stated, it was plaintiff's burden to prove reasonable diligence in the service of process and it was further his nondelegable duty to make sure the process server made a prompt and proper return. Such returns would have supported plaintiff's assertions that he made several attempts at serving defendant between December 2011 and June 2012, while their absence from the record establishes a lack of reasonable diligence in obtaining service. Assuming plaintiff's summonses were issued and delivered to process servers as he alleges, he failed to ensure proper returns were made on four occasions. Although plaintiff contends he attempted to contact Detect Systems to no avail in June 2012, the record fails to reflect he took any action prior to that time to determine why returns were not being filed. Notably, he asserted in his filings that two summonses (the January or February 2012 summons and the April 2012 summons) were given to the Champaign County Sheriff for service; however, he failed to allege he made any inquiry with the Sheriff's office regarding any attempts at service.

¶ 30 Douglas's affidavit states she acted on plaintiff's behalf and attempted to serve "a series" of summonses on defendant, making "in the neighborhood of 20 attempts to serve

[defendant] throughout 2012, up to July, 2012." However, not only does Douglas's affidavit fail to set forth specific time frames regarding when she received the summonses and attempted service, but according to plaintiff, only two summonses were given to Detect Systems for service, the initial summons allegedly issued in December 2011 and the June 2012 summons. As discussed, the record fails to reflect a valid summons was issued by the circuit court clerk in December 2011. Additionally, the delivery of a summons to Detect Systems for service on defendant in June 2012, does not explain or excuse plaintiff's previous six months of inactivity as reflected by the court record.

¶ 31 Here, plaintiff's activities in obtaining service on defendant were a factor for the trial court to consider in ruling on defendant's Rule 103(b) motion to dismiss. Given the facts presented, the court's finding that this factor weighed against plaintiff and in favor of defendant was not "clearly against logic" and, thus, was not an abuse of discretion.

¶ 32 The trial court also found other factors weighed in favor of defendant, including plaintiff's knowledge of defendant's location, the ease with which defendant's whereabouts could have been ascertained, and actual knowledge by defendant of the pending action as a result of ineffective service. As noted by the court, each summons attached by plaintiff to his written filings sets forth defendant's address as "2120 Ivy Ct., Champaign, Illinois 61821." This is the address where defendant was ultimately served by Meador Investigations on August 7, 2012, seven days after the second alias summons was issued. Thus, the record shows plaintiff had knowledge of defendant's location throughout the pendency of the case and defendant was served apparently without difficulty following the issuance of the second alias summons. The record further fails to show any knowledge by defendant, prior to when she was served, that an action

was pending. We find no error in the trial court's determination that these factors weighed in defendant's favor.

¶ 33 Finally, we note plaintiff actually obtained service on defendant on August 7, 2012, eight months and two days after plaintiff's complaint was originally filed. This court has previously affirmed dismissals under Rule 103(b) based upon a lack of due diligence by plaintiff where the defendant was not served until approximately five months after the complaint had been filed (*Smith*, 348 Ill. App. 3d at 1056, 811 N.E.2d at 362), and more than eight months after filing of the complaint (*Penrod*, 150 Ill. App. 3d at 129, 501 N.E.2d at 369).

¶ 34 On appeal, plaintiff challenges the trial court's decision on the basis that it erred in attributing a certain statement to Douglas. Although the record does show the court attributed a statement to Douglas that she did not make, we agree with defendant's position that the court's error was likely a scrivener's error and the court unintentionally referred to the wrong affiant. The statement attributed to Douglas was actually made by Duge in her affidavit and it is clear from the record that the court was attempting to quote Duge's affidavit. The court's error is inconsequential.

¶ 35 Plaintiff further challenges the trial court's finding that he failed to show Detect Systems was an authorized process server. See 735 ILCS 5/2-202(a) (West 2010) ("[P]rocess may be served *** by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 or by a registered employee of a private detective agency certified under that Act ***."). As stated, it was plaintiff's burden to establish that he was reasonably diligent in obtaining service on defendant. Reasonable diligence requires compliance with the Code and the supreme

court rules regarding service, including delivering the summons to an authorized process server for service. In this instance, the record failed to reflect Detect Systems was an authorized process server. Plaintiff argues he provided the "identification number for Detect Systems" in his motion to reconsider, which states "Kris Douglas (117-000-848), one of the owners of Detect Systems." However, he provided no context for the number set forth after Douglas's name and it is unclear what that number represents.

¶ 36 Nevertheless, even assuming Detect Systems was an authorized process server, we find no error in the trial court's ultimate conclusion. As discussed, plaintiff failed to show he was reasonably diligent in obtaining service on defendant. The trial court did not abuse its discretion in granting defendant's motion to dismiss.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment.

¶ 39 Affirmed.